IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Docket No. ~~1165~~ 92

APR 19 1967
JOHN F. DAVIS, CLERK

UNITED STATES OF AMERICA,

vs.

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

Defendants-Petitioners,

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco., Inc.,

Non-Party Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARTHUR HILL CHRISTY
CHRISTY, BAUMAN, FREY & CHRISTY
Counsel for Non-Party Respondent
Office and P.O. Address
45 Rockefeller Plaza,
New York, New York 10020.

JOSEPH J. MARCHESO
ROBERT J. GIORDANO
of Counsel

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The Questions Presented

This application presents the following questions:

1) Should this Court grant piecemeal appeal to review the proceedings below when those proceedings amount to no more than petitioners' unsuccessful attempt to suppress the Government's use of evidence upon petitioners' forthcoming criminal trial.

2) Does due process require that petitioners under indictment in the United States District Court for the Southern District of New York have the option of non-appearance in the Trustee's independent civil litigation pending in the United States District Court for the Eastern District of New York where they refuse to assert their privilege against self-incrimination and refuse to make any meaningful motion under 30(b) of the Federal Rules of Civil Procedure.

Statement of Facts

A. Public Events Leading Up to Trustee's Complaint

Continental Vending Machine Corp. ("Continental") was, until April 8, 1963, engaged in the manufacture, operation, sales and service of coin-activated vending machines.

Harold Roth ("Roth") was President, Chairman of the Board and principal stockholder of Continental from 1956 to March 1963. At that time he resigned as President and Chairman of the Board. He controlled and dominated Continental from 1956 when he acquired a controlling interest through merger. He also controlled and dominated Valley Commercial Corp. ("Valley"), a small, privately-owned corporation, ostensibly in the finance business (96a-97a, R 277).

Lybrand, Ross Bros. & Montgomery ("Lybrand") is a firm of certified public accountants which holds itself out to the public as being "independent" public auditors. Lybrand was retained by Roth in 1956 in connection with Roth's takeover of Continental by the merger of certain of his privately-owned companies into Continental and remained as the "independent" auditors of Continental from 1956 to approximately May 1963 (11a, R 277).

Petitioners Simon and Kaiser are partners in the Lybrand firm; petitioner Fishman is a senior employee of Lybrand. These three men were the central figures in conducting Lybrand's "independent" audit examinations of Continental's financial statements.

Continental is a publicly-owned corporation with over 5,000 security holders. There are two classes of securi-

ties outstanding, 4,080,701 shares of common stock, and as a result of a public offering in December of 1961, $4,719,700 principal amount of 6% convertible subordinated debentures. These securities were registered and until February 27, 1963, were traded on the American Stock Exchange, a national securities exchange (96a, R 277).

Continental's financial statements related to the fiscal period ending September 30th. By certification, dated February 15, 1963, Lybrand certified to Continental's financial statements for the fiscal year ending September 30, 1962. Among other assets, the statements showed a receivable due from Valley Commerical Corporation in the approximate amount of $3.5 million. It was presented as though the receivable was fully secured and realizable in full. In fact, the receivable was worthless (R 279, R 317-320, 100a).

During the month of February 1963 the American Stock Exchange made certain inquiries relating to Continental's condition. On February 27, 1963, as a result of these investigations, the American Stock Exchange suspended trading in Continental's securities (102a).

On April 8, 1963, by order of the United States District Court for the Southern District of New York, based upon a complaint filed by the Securities & Exchange Commission ("SEC"), a conservator was appointed to take possession of, and operate, Continental's business. The SEC charged that Harold Roth and others were despoliating Continental's assets. The SEC reported that Roth was using Valley as a conduit to syphon off millions of dollars of Continental's money for his own use and benefit and by January 31, 1963, more than $4 million of Continental's badly needed cash had been funnelled to Roth through Valley; Valley was unable to pay Continental because Roth was unable to pay Valley. The Valley receivable

as shown on Continental's financial statement was worthless. Less than two months after Lybrand had given a clean certificate to Continental's financial statement, the SEC's complaint averred:

> "Under the stewardship of the individual defendants, less than a year and a half after raising more than $5 million from the public, defendants are unable to account to the Commission, the American Stock Exchange or the investing public as to Continental's true financial picture and the disposition by Continental of the funds it received. As officers and directors, under the aegis of Roth, they have stood idly by and watched millions of dollars of securities holders' moneys flow through Valley to Roth and family for reasons for which they are unable to account. They have permitted hundreds of thousands of dollars of the amount received by Valley to be advanced in many cases without interest or security, to themselves. The books and records of Continental and Valley are so incomplete and inadequate that no proper Form 10-K can be filed until an independent audit has been made under the supervision of a receiver acting under the direction of this Court. Defendants have in their possession, custody and control money and property of Continental and Valley which they may transfer, sell, assign, pledge or otherwise waste or dissipate to the immediate and irreparable loss and damage of Continental's public security holders, unless the Court appoints a receiver of the assets of Continental and Valley." (95a-106a).

The Conservator was unable to prevent insolvency. An involuntary petition praying that Continental be reorganized pursuant to Chapter X of the Bankruptcy Act was filed in the Eastern District of New York and by order dated July 12, 1963, the Hon. Jacob Mishler, the United

States District Court Judge for the Eastern District of New York, granted the involuntary petition and appointed the Conservator, under Judge Bonsal's order, and Irving L. Wharton as Co-trustees of Continental. Irving L. Wharton, a citizen and resident of the State of New York, is now the sole duly qualified and acting Trustee of Continental (95a-106a, R 267, 321-22).

B. The Trustee's Civil Suit

By September 1964, more than two years before the criminal indictment, the Trustee had decided to bring suit against Lybrand. The complaint was not filed at that time since, at Lybrand's request, the Trustee and Lybrand undertook negotiations to explore the possibility of settling the Trustee's claims without suit. The negotiations failed, and on July 1, 1965, the Trustee filed a civil action (65 Civ. 664) naming as defendants Lybrand, a financial institution and Harold Roth. The action against the financial institution has been withdrawn due to settlement. Harold Roth has taken the Fifth Amendment and Lybrand remains the only defendant subject to discovery. The petitioners are the central actors in the Lybrand engagement and are the only persons who can supply information relating to the vital areas of the Continental audit (108a).

The Trustee's complaint alleges in essence: 1) breach of contract and warranty for each of the audit years 1958 through 1962; 2) negligence and reckless behavior on the part of Lybrand in regard to each of the audit years 1958 through 1963; and 3) conspiracy to despoil the assets of Continental and to conceal these acts through various means, including the certification and issuance of false financial statements by Lybrand (11a, 108a, R 276-363).

Immediately after the filing of the complaint, the Trustee began extensive discovery proceedings against Lybrand.

By mutual agreement of counsel, it was arranged that all Lybrand worksheet papers and documents relating to the audit years in question were placed in the tax conference room at Lybrand and made available to the Trustee's attorneys and accountants. By September 1965 the Trustee began conducting depositions upon oral examinations of various members of the Lybrand firm, including the deposition of petitioner Simon. By the week of October 11, 1966, the Trustee was finishing his examination of one McDevitt, a Lybrand employee, and by mutual agreement the deposition of Kaiser was scheduled for October 21, 1966. Kaiser's appearance had been scheduled for an earlier date, but due to the pressures of Lybrand business, the Trustee's counsel agreed to a postponement (12a).

C. The Criminal Indictment

On October 17, 1966, 15 months after the filing of the Trustee's complaint, an indictment was returned in the Southern District of New York naming Roth and petitioners Simon, Kaiser and Fishman. Among the co-conspirators named but not indicted was the Lybrand firm and McDevitt (75a-89a).

There are, admittedly, points of approach and contact between the issues raised by the Southern District indictment and the Trustee's civil case. Of course, in that the indictment is not concerned with events prior to 1961 and is not concerned with questions of breach of contract, breach of warranty and of negligence, it differs substantially from the complaint. There are significant areas open for examination which have absolutely no relation to the issues raised in the criminal case.

D. Petitioners' Voluntary Disclosures to the Government

During the course of the criminal investigation, petitioners Kaiser, Simon and Fishman were represented by competent counsel. Petitioners and the Lybrand firm, adopted the position that they were going to make full disclosure to the Government and to the SEC in order to stave off the threatened indictment. Accordingly, all of the Lybrand worksheet papers, including those prepared by the petitioners, were made available to the Government and the Government's accountants. More important, Kaiser, Simon and Fishman appeared before the Federal Grand Jury and testified, not once, but several times, as did other representatives of the Lybrand firm (R 63-65, 26a-27a).

Petitioners, as well as Lybrand, asked permission to present accounting experts to testify before the Grand Jury; this permission was granted and outside accounting experts testified in petitioners' behalf. Counsel for petitioners joined separate counsel for the Lybrand firm in submitting to the United States Attorney's Office a detailed written memorandum which contained petitioners' factual contentions and theories in their defense in regard to the criminal charges. Thus, petitioners, as well as the Lybrand firm, voluntarily gave to the Government the widest latitude of discovery (R 62-65, 26a-27a).

E. Kaiser Deposition

Soon after the criminal indictment was filed, counsel for petitioners and counsel for Lybrand took the position that the depositions in the Eastern District civil action should be stayed. However, only Kaiser moved in the United States District Court for the Eastern District of New York

before Judge Mishler for a vacatur of his scheduled deposition under Rule 30(b) of the Federal Rules of Civil Procedure. His motion was based on very restrictive grounds: that his mere appearance at the depositions, in light of the criminal indictment, would be oppressive and violative of his constitutional rights. Kaiser's counsel refused to state to the Court whether or not Kaiser intended to invoke any constitutional privilege at his examination. Judge Mishler ruled that there was nothing oppressive about Kaiser's mere appearance at his scheduled examination and that assertion of constitutional rights on a motion to vacate was premature. Accordingly, Kaiser was ordered to appear for examination, but was free to assert at the examination any constitutional privilege he might think appropriate (45a-48a).

Kaiser appealed, but that appeal was dismissed summarily on October 16, 1966, obviously because it was premature—nothing of significance had yet occurred in the Court below. The Court of Appeals remanded matters back for further proceedings in the District Court (59a).

On October 26, 1966, Kaiser appeared at his scheduled deposition at the United States District Court for the Eastern District of New York. Kaiser waived his Fifth Amendment privilege and chose to testify for the remainder of that day. On October 31, 1966, Kaiser again appeared at his scheduled examination, waived his privilege under the Fifth Amendment and testified during that day. Further deposition dates were fixed for November 2 and November 4, 1966. Never once did Kaiser assert his Fifth Amendment privilege to avoid the lawful process of the Eastern District Court either under the due process or self-incrimination clauses (R 4-17).

On October 27, 1966, petitioners added to the already impressive array of legal talent representing them. They

switched forums and moved in the criminal motion part in the Southern District of New York for an order enjoining the civil case against Lybrand until the completion of the criminal case, on the grounds that the continued depositions would provide evidence to the Government, otherwise unavailable to it, and that the depositions would be burdensome (90a).

On November 1, 1966, Judge Bryan heard oral argument on the application and papers were submitted to him. He held no hearings. Approximately 37 days passed and nothing was heard from Judge Bryan. During that time Judge Mishler became concerned with what he considered to be an interference with the legitimate jurisdictional exercise of the Eastern District. He was concerned that the delay was affecting the moving of the civil case for trial; the just prompt determination of the rights of creditors; and was unduly interfering with the plan of reorganization and the winding up of Continental's affairs, now more than three and-a-half years old. Accordingly, he issued an order on December 5, 1966 in furtherance of his original order of October 24, 1966 directing that the examination of Kaiser go forward despite the temporary stay, now more than 20 days old, issued from the Southern District of New York, which assumed to the Southern District the power to stay the Eastern District process (60a-63a, 64a-71a). Both sides found themselves on the horns of a dilemma with the Eastern District ordering them to proceed and the Southern District ordering a stay. Kaiser then moved before the Court of Appeals for a temporary stay of Judge Mishler's direction of December 5, 1966. The Court of Appeals granted a temporary stay in order to give Judge Bryan a chance to render his decision. Several days later, Judge Bryan issued the instant opinion which enjoined the Trustee from examining Kaiser, Fishman and Simon.

F. Judge Bryan's Order and Court of Appeals Reversal Thereof

Judge Bryan's opinion holds that "civilized standards of procedure and evidence" require that a person under indictment be given the option of non-appearance in any related civil case outstanding in any federal or state court. Moreover, this option need not be asserted in the forum that controls the civil litigation. Judge Bryan assumed to himself "sitting in the criminal motion part" a supervisory power over the process of every other federal or state court. Accordingly, he stayed the legitimate process of the Eastern District of New York without requiring petitioners to make a meaningful application before that Court. He originated his vast display of power despite the fact that petitioners had adequate remedies under either the Fifth Amendment or a motion under 30(b) of the Federal Rules of Civil Procedure. Judge Bryan's opinion is not justified by precedent or by necessity.

Every case relied on by Judge Bryan (See cases cited in footnote on pg. 10 of petitioners' brief), indeed every reported case on this subject, are cases that were brought under Rule 30(b) of the Federal Rules of Civil Procedure before the district court or judge controlling the civil case. They all stand for the proposition that the district court controlling the civil case has a discretionary power to stay its proceedings under Rule 30(b) of the Federal Rules of Civil Procedure if the movant can show that the civil case is being used as a "dodge" to subvert the criminal case or to avoid the protections of the Fifth Amendment. And absent the ability to make such a showing, a witness in a civil proceedings can avoid testifying in those proceedings only by invoking his rights under the self-incrimination clause of the Fifth Amendment.

The Court of Appeals reversed Judge Bryan because it was conceded that the Trustee's civil case was an independent proceeding brought long before the criminal case and in furtherance of the legitimate interests of literally thousands of security holders and creditors; that "the Trustee requires" the petitioners' "deposition testimony to complete his preparation for the trial of the Eastern District action, which must be received before the bankruptcy reorganization of Continental, already three and one-half years old, can be completed"; it is conceded that the Trustee seeks in "good faith" to depose the appellees for that purpose alone, and there has been no consultation between the Trustee and the Government in regards to the conduct of the Trustee's civil case (A7). The Court of Appeals assumed that Judge Bryan had the power to act, but reversed Judge Bryan because they recognized that there is nothing about the Trustee's civil case that is "unfair" or threatens the integrity of the criminal case.

Reasons for Denying the Writ

1) The proceedings in the Courts below represent, as far as petitioners are concerned, an effort to suppress the Government's use of evidence upon petitioners' forthcoming criminal trial and therefore is not subject to piecemeal review by this Court.

2) This petition presents no substantial or important questions which require resolution by this Court. The numerous federal court decisions relating to the episodic situation here presented have established clear and fair standards. There is no conflict between the Fifth and Second Circuits on these standards.

I

It is clear that petitioners were attempting in the Courts below to suppress the Government's use of evidence in advance of the criminal trial. The only difference between petitioners' application before Judge Bryan and a traditional motion to suppress under Rule 41(e) of the Federal Rules of Criminal Procedure is the fact that the evidentiary material here complained of was not yet in being. Petitioners' status in the Courts below is the same as if a motion to suppress evidence had been made and denied. As such, these proceedings are no more than a step in a pending criminal case relating to the possible use by the Government of evidence in connection with the criminal trial. In this Court's ruling in *DiBella* v. *United States,* 361 U.S. 121 (1962) such pretrial rulings affecting the criminal case are not subject to piecemeal review and this Court will wait until the completion of the criminal trial before entertaining appeal.

II

Petitioners admit on page 10 of their brief that federal courts deal "frequently with questions concerning the control of discovery in concurrent civil and criminal litigation in order to avoid prejudice . . ." They do not suggest that the standards set down in *Campbell* v. *Eastland,* 307 F2d 478 (5th Cir. 1962), cert. denied 371 U . 955 (1963), and in the cases cited thereunder in the footnote on page 10 of their brief are inadequate. Indeed, they urge them. The Court of Appeals' decision in the present case is in complete accord with the standards set down in *Campbell* v. *Eastland* and cases cited thereunder. There is absolutely no conflict between the Circuits.

III

The standards established by those cases require that a motion to stay or limit discovery must be made under Rule 30(b) of the Federal Rules of Civil Procedure before the court in which the action is pending, and absent the ability to show that the process of the Federal Rules of Civil Procedure is being used as a "dodge" to circumvent or subvert the criminal case, a witness in the civil proceeding can avoid testifying only by assertion of his privilege against self-incrimination. Indeed, the entire problem here is one of Fifth Amendment dimensions. Petitioners point out that the Government would not be able to obtain petitioners' testimony on its own. However, if petitioners took the same position with the Government as they have done with the Trustee, namely, to waive their rights against self-incrimination and voluntarily make disclosures to the Government, then, of course, the Government would be entitled to use those disclosures. (In fact, petitioners have done exactly that and have made full disclosure to the Government). It is the privilege against self-incrimination which restricts the Government from obtaining discovery from a defendant in a criminal case. Why, then, should it be unreasonable to request the petitioners to assert that same privilege in the Trustee's civil proceedings.

Judge Bryan seeks to excuse petitioners from the requirement of asserting their privilege against self-incrimination by suggesting that such assertion would end the professional careers of petitioners. This claim by petitioners is seductive; it is not supported by a scintilla of evidence in the record below. Petitioners have been unable to cite any rule, law, canon of professional ethic or State licensing requirement which indicates that a certified

public accountant must lose his professional standing upon assertion of the privilege. We can find none; and if there were one, this Court's recent opinion in *Spevack* v. *Klein*, 87 S.Ct. 625 (1967), would render it inoperative. Moreover, petitioners are career men in the Lybrand organization. Lybrand has publicly announced in the press that the firm "vigorously supports" petitioners in their defense of the criminal case. Lybrand has provided them with counsel; Lybrand obviously approved of petitioners' original application before Judge Bryan which sought to seal the lips of all Lybrand personnel; and it is equally obvious that Lybrand supports petitioners' present application. The idea that Lybrand would continue its support if petitioners seek to remain mute on a claim based on the due process clause of the Fifth Amendment, but would abandon them in punishment if they were to remain mute on a claim based on the self-incrimination clause of the Fifth Amendment, is stretching credulity to the breaking point.

Contrary to the assertion on pages 11 and 12 of petitioners' brief, the Court of Appeals completely and correctly stated the nature of the petitioners' Fifth Amendment rights in the instant controversy:

> "It is true that appellees have testified in the trustee's depositions and before the grand jury that indicted them without asserting their priviliges against self-incrimination. Since, however, 'it is well established that a waiver of the privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceeding,'" United States v. Miranti, 253 F. 2d 135, 139 (2 Cir. 1958); see 8 Wigmore, Evidence §2276, at 470-72 (McNaughton rev. 1961), the appellees Kaiser and Fishman certainly, and Simon probably, could have interposed the privilege when the trustee sought to depose them after the indictment was returned..

"Appellees urge that, as accountants, they 'would lose their professional lives' by invoking the privilege. We are not sure that they would, if it were made clear that the privilege was claimed only on advice of counsel in order to prevent pretrial disclosure of their factual contentions. Whether or not they would, however, the same dilemma is faced by any witness in a civil or criminal trial who is himself under investigation or indictment for other crimes. Such a witness must either invoke his privilege against self-incrimination, or assume 'the general duty to give what testimony one is capable of giving.'" See 8 Wigmore, Evidence §2192 (McNaughton rev. 1961).

"It is for the same reason that a witness who has been given immunity from prosecution must testify although his testimony may expose him to such extra-legal pressures as 'loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium.' Ullmann v. United States, 350 U. S. 422, 430 (1955); see Piemonte v. United States, 367 U. S. 556 (1961). We cannot agree that 'civilized standards of procedure and evidence,' McNabb v. United States, supra at 340, require that a witness under indictment be given the option of non-appearance in any proceedings in related civil or criminal cases until his own trial is concluded." (A9).

IV

The only real effect of Judge Bryan's injunction is to afford the petitioners a preferred status and relieve them of the obligation of asserting their privilege of self-incrimination. To do this he conjures up an arbitrary power that threatens to create a situation of injunction and counter-injunction between federal courts. The Court

of Appeals correctly recognized that the situation brought about by petitioners' refusal to exercise their rights under the Fifth Amendment and under Rule 30(b) of the Federal Rules of Civil Procedure did not require Judge Bryan's display of raw power. Contrary to the contention in Point III of petitioners' brief, Chief Judge Lumbard correctly assessed the possibility of chaos inherent in Judge Bryan's ruling:

> "We are also led to reverse Judge Bryan's order by the consideration that injunctions against prosecution of independent actions are fraught with possibilities of conflict between courts, which a court of appeals may not in other cases be in so happy a position to resolve as we are here. If this injunction were upheld, a like one might well be issued against the prosecution of an action in a district court outside this circuit, or even in a state court. Especially as a defendant called upon to depose in a civil case in a federal district court can move in that court under Fed. R. Civ. P. 30(b) to stay or limit the deposition, the district court in which the criminal case is pending should enjoin the taking of such a deposition only in exceptional circumstances. As we have held, no such circumstances are present here." (A9).

V

There is no conflict between the Fifth Circuit's decision in *Campbell* v. *Eastland*, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963), and the decision of the Second Circuit in the present case. Contrary to the assertion in Point II of petitioners' brief, the decision of the Court of Appeals is completely in accord with the governing principles enunciated by the Fifth Circuit. The *Campbell* case rested on facts significantly different from the instant application. In that case, prospective defend-

ants in a criminal tax prosecution commenced a civil action for a tax refund. The facts underlying the claim for refund were known to the plaintiffs. The Court found that the civil suit was commenced as a "dodge" in order to enable the plaintiffs to discover from the government statements and reports protected under Title 18 U.S.C. § 3500, and "to be honest about it, the motion for discovery (if not the suit for refund) was for the purpose of obtaining otherwise unobtainable reports." 307 F2d 478, 490. The entire proceedings were brought before the judge in charge of the civil case. He granted discovery of the § 3500 reports. It was in that context that the Fifth Circuit set down the governing principles approved of by petitioners and set forth, in part, on pages 12 and 13 of their brief:

> "In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive . . . Separate policies and objectives support these different rules.
>
> ". . . 18 U.S.C.A. § 3500 does away with any pretrial discovery of statements of a government witness. A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other.

> In some situations it may be appropriate to stay the civil proceeding. United States v. Bridges, N.D. Calif., 1949, 86 F.Supp. 931. In others it may be preferable for the civil suit to proceed—unstayed. In the proper case the trial judge should use his discretion to narrow the range of discovery. Here, however, the trial judge seemed to think that he had no discretion—once discovery was moved for in a civil suit." 307 F2d 478, 487.

It is significant that the Fifth Circuit placed the burden of "judicial discretion and procedural flexibility" in the hands of the judge in control of the civil case. Even in such a patent situation as presented by the *Campbell* case, the Fifth Circuit did not suggest that judicial discretion should prohibit the plaintiff from all discovery:

> "Limited discovery and other remedies were available which would not be vulnerable to improper inspection. Thus, the plaintiffs were clearly entitled to discovery of any documents obtained from the plaintiffs' files. By interrogatories under Rule 33, the plaintiffs could learn the names and addresses of persons having knowledge of relevant facts. By depositions under Rule 26, they could ascertain relevant facts known to the agents. . . ." 307 F2d 478, 488.

If anyone failed to use "judicial discretion and procedural flexibility" in relation to the instant case, it was Judge Bryan. He cut off all discovery of petitioners by the Trustee. Only Judge Mishler, sitting as the Rule 2 Judge in control of the civil case in the Eastern District of New York, could exercise that "judicial discretion and procedural flexibility" called for by this situation. Under Rule 30(b) of the Federal Rules of Civil Procedure petitioners could have moved, and still can move, for an

order impounding their depositions. This, of course, would have completely eliminated petitioners' claimed prejudice. Petitioners' counsel admitted on oral argument before the Court of Appeals that such an order would effectively protect petitioners. Only Judge Mishler could have employed the "limited discovery" provisions called for by *Campbell* v. *Eastland, supra*. As we have pointed out, petitioners have made substantial voluntary disclosure to the Government. They are in possession of their Grand Jury testimony. It is conceded that discovery by the Trustee to the same extent as the information already voluntarily given to the Government could not in any manner prejudice petitioners.

Petitioners on page 13 of their brief, attempt to create the appearance of conflict by quoting out of context a single phrase in the Second Circuit's opinion. The Second Circuit's remark, "we decline to follow", related only to petitioners' erroneous analysis of three district court cases; it had no relation whatsoever with the Fifth Circuit's opinion:

> "Judge Bryan relied heavily upon two lines of cases in which it has been consistently held that where both civil and criminal proceedings arise out of the same or related transactions an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter • • • whether the defendant in the criminal case seeks to use the civil rules to obtain disclosure of the Government's evidence,' citing, for example, Campbell *v.* Eastland, 307 F. 2d 478 (5 Cir. 1962), cert. denied, 371 U. S. 955 (1963), "or whether the Government seeks a similar advantage to secure evidence not otherwise available to the prosecution," citing Perry *v.* McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964), Paul Harrigan & Sons, Inc. *v.* Enterprise Animal Oil Co., Inc., 14 F.R.D. 333 (E.D. Pa. 1953), and National Discount Corp. *v.* Holz-

baugh, 13 F.R.D. 236 (E.D. Mich. 1952), 262 F. Supp. at 74.

"Both lines of cases seem to us to be inapposite. Cases where the criminal defendant seeks disclosure of the government's evidence, or the government seeks disclosure of the defendant's, are distinguishable because here the trustee, who seeks to depose appellees, is pursuing an independent action on behalf of Continental's creditors and security holders, which was commenced more than one year before the indictment was found. And the cases in the second line appear to us, as they did to Judge Mishler in his opinion of October 24, 1966, to rest upon the deponent's assertion of his privilege against self-incrimination; to the extent that they do not, we decline to follow them. In both National Discount Corp. *v.* Holzbaugh, supra, and Paul Harrigan & Sons, Inc. *v.* Enterprise Animal Oil, Inc., supra, the deponents explicitly asserted their privileges against self-incrimination, and the court in Perry *v.* McGuire, supra, cited both cases in holding that interrogatories directed to a criminal defendant "would be oppressive and would infringe on his constitutional rights." 36 F.R.D. at 273. Moreover, all three cases arose on Rule 30(b) motions made in the court in which the civil action was pending; none is a precedent for the injunction Judge Bryan issued."

VI

Indeed, if considerations of fairness are considered, they require that the Trustee be permitted to continue the expeditious prosecution of his independent civil suit. Petitioners have voluntarily given the Government their factual contentions and the basis of their defense. Ironically, it is only the Trustee who has been denied the factual

contentions of petitioners. This, coupled with the fact that petitioners doggedly refuse to take advantage of the clearly adequate remedies available to them in the civil case, indicates that petitioners' real desire is to frustrate the Trustee in his civil suit against Lybrand. Petitioners and the Lybrand firm clearly recognize that the delay of months and possibly years may very well be disastrous with regard to the Trustee's ability to continue his long and expensive suit. Judge Bryan found that the civil case is not ready for trial. That is precisely the point. The Trustee cannot get the civil case ready for trial without the factual contentions of petitioners. Judge Mishler, who is far more familiar with the civil case, has clearly stated that the delay occasioned by Judge Bryan's stay, now more than six months in duration, severely prejudiced the Trustee's suit and ability of the Trustee to wind up the affairs of the bankrupt, now almost four years old.

The Court of Appeals for the Second Circuit clearly and concisely enunciated the balance on the conflicting interests:

> "This appeal requires us to balance appellees' desire to prevent pretrial disclosure of their factual contentions to the prosecution in the Southern District criminal proceeding, without asserting their Fifth Amendment privileges against self-incrimination, against the interest of the trustee, representing numerous creditors and public security holders of Continental, in the expeditious progress of the Eastern District action. The trustee requires the appellees' deposition testimony to complete his preparation for the trial of the Eastern District action, which must be resolved before the bankruptcy reorganization of Continental, already three and one-half years old, can be completed. It is conceded that the trustee seeks

in good faith to depose appellees for purposes of the Eastern District action, and that there has been no consultation on lines of questioning between the trustee and the United States Attorney for the Southern District.

"Under these circumstances, the public interest in the progress of the Eastern District action clearly outweighs the appellees' interest in withholding their testimony until after the Southern District trial without invoking their privileges against self-incrimination. . . . As long as appellees' preparation for the Southern District criminal trial is not hampered, we see no valid distinction in the fact that appellees' remaining depositions could not be scheduled until after the indictment was returned. In both cases, if appellees choose not to assert their privileges against self-incrimination, we see no reason why their testimony should be withheld from the trustee. The fact that additional testimony thereby becomes available to the government is merely the natural byproduct of another judicial proceeding; and to that extent it might be 'discovery', but it is not discovery which the government has initiated or promoted for the purpose of circumventing the Federal Rules of Criminal Procedure or any constitutional right of the appellees. Indeed the constitutional rights of the appellees are unimpaired; here they are in suspension because the appellees have not chosen to avail themselves of their Fifth Amendment privileges."

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

ARTHUR HILL CHRISTY
CHRISTY, BAUMAN, FREY & CHRISTY
Counsel for Non-Party Respondent
Office and P.O. Address
45 Rockefeller Plaza,
New York, New York 10020.

JOSEPH J. MARCHESO
ROBERT J. GIORDANO
of Counsel

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